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October 4, 1999

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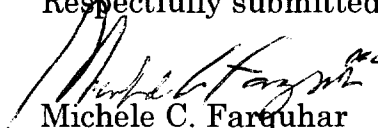
Re: CC Docket No. 96-45/DA 99-1356
Western Wireless Corporation Petition for Preemption
of a South Dakota PUC Order Denying ETC Designation

Dear Ms. Salas:

On behalf of Western Wireless Corporation, I am enclosing a letter from Gene DeJordy, Executive Director, Regulatory Affairs, Western Wireless, to Chairman Kennard regarding the proceeding referred to above.

If you have any questions, please contact me.

Respectfully submitted,


Michele C. Farquhar
Counsel for Western Wireless Corporation

Enclosures

cc: Service List

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FEDERAL COMMUNICATIONS COMMISSION
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BY HAND DELIVERY

Honorable William E. Kennard, Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

**Re: CC Docket No. 96-45, DA 99-1356
Western Wireless Corporation Petition for Preemption
of a South Dakota PUC Order Denying ETC Designation**

Dear Chairman Kennard:

On behalf of Western Wireless Corporation, I am writing to highlight the common views of some state commissions regarding a key issue affecting the designation of eligible telecommunications carriers ("ETCs") under 47 U.S.C. § 214(e).

As you probably know, Western Wireless has sought preemption of a South Dakota Public Utilities Commission ("SDPUC") order that held that a carrier must already be providing universal service ubiquitously before it can receive ETC designation, and on that basis denied our request for designation as an ETC in South Dakota. ^{1/} Comments by the Minnesota Department of Public Service ("MNDPS") and the Washington Utilities and Transportation Commission ("WUTC") support Western Wireless' argument that the SDPUC's conclusion is incorrect. Instead, both state agencies agree with Western Wireless that a carrier that demonstrates that it is capable of satisfying the ETC requirements should then receive ETC status, and subsequently should be expected to provide the supported services throughout its service area.

^{1/} Western Wireless sought preemption of the ruling as inconsistent with Section 214(e), the FCC's interpretation thereof, and the pro-competitive universal service provisions of the Act, and because it is a barrier to entry in violation of 47 U.S.C. § 253. The Petition for Preemption shows that the only feasible reading of Section 214(e) is to require that carriers show a capability and commitment to shoulder the burdens of being an ETC, *then* provide the service required of ETCs, and that the SDPUC's interpretation of Section 214(e) – that carriers must ubiquitously provide universal service *before* being designated as ETCs – presents an insurmountable barrier to competitive entry in high-cost areas and is inconsistent with the Act.

FCC Chairman Kennard
October 4, 1999
Page 2

The MNDPS, which represents the public interest before the state PUC (analogous to the staff of many commissions), submitted comments (copy attached) stating that there should be a "sequential progression – ETC designation, then provision of supported services, then receipt of funding." ^{2/} Likewise, the WUTC, in its reply comments (copy attached), recognizes that to facilitate competitive entry, states must designate carriers as ETCs prior to their providing universal service, because competitive entry will not occur if a carrier must invest in plant and equipment prior to knowing if it will be an ETC.

This support from Minnesota and Washington is consistent with the conclusion of every other state commission that has issued a final order addressing the issue. For example, the Maryland Public Service Commission granted ETC status to MCI based on the carrier's *prospective* commitment to offer universal service, and its pledge to advertise the offering throughout the service area. In addition, several other states, including Arkansas, California, Washington, Wisconsin, and Puerto Rico, have designated as ETCs wireless carriers with service offerings, footprints, rate plans and networks presumably similar to those of Western Wireless.

These state approaches to the timing of ETC designations are consistent with that taken by the FCC. In the FCC's first Report and Order implementing the Act's new universal service provisions, the Commission held that "a carrier must meet the section 214(e) criteria as a condition of its being designated an eligible carrier and *then* must provide the designated services to customers" in order to receive support (at ¶ 137, emphasis in original). Accordingly, when Fort Mojave Telecommunications, and several other carriers, sought designation as ETCs under 47 U.S.C. § 214(e)(6), the FCC granted ETC status based on its finding that each of the carriers "offers, or *will be able to offer*, all of the services designated for support by the Commission."

The FCC thus has already recognized that it is economically infeasible – and therefore impossible in practice – for unsubsidized carriers to enter a

^{2/} The Minnesota PUC recently announced that it has granted ETC status to Western Wireless in Minnesota. The order to that effect has not yet been released. See attached Western Wireless press release.

FCC Chairman Kennard
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Page 3

competitive market by offering a service that its competitors already offer at a substantially subsidized price. A requirement that a carrier first enter a market at such an economic disadvantage in order to receive the same subsidies as its competitor is a barrier to entry both unintended by Section 214(e), and deserving of preemption under Section 253.

The SDPUC must not be permitted to impede entry by competitive carriers or to frustrate the advancement of the 1996 Act's universal service goals by applying unsupported and inappropriate standards in designating ETCs for participation in the federal universal service program. The Commission must therefore preempt the SDPUC order denying Western Wireless ETC status in South Dakota on an expedited basis.

Respectfully submitted,



Gene DeJordy
Executive Director, Regulatory Affairs
Western Wireless Corporation

Enclosures

cc: Honorable Susan Ness, Commissioner
Honorable Harold W. Furchgott-Roth, Commissioner
Honorable Michael K. Powell, Commissioner
Honorable Gloria Tristani, Commissioner
Lawrence Strickling, Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

| | | |
|--|---|---------------------|
| In the Matter of |) | |
| |) | |
| Western Wireless Corporation Petition for |) | CC Docket No. 96-45 |
| Preemption of an Order of the South Dakota |) | |
| Public Utilities Commission |) | |

Comments of
The Minnesota Department of Public Service
(The Minnesota Department of Commerce)

(To avoid future confusion, it should be noted here that the State of Minnesota's telecommunications regulation unit will be transferred from the Department of Public Service to the Department of Commerce effective September 6, 1999.)

The Minnesota Department of Public Service (MNDPS) files these comments in response to the July 19, 1999, Public Notice in the above referenced docket setting up the comment periods, and the Order released on August 4, 1999, revising the dates for the comment periods.

Background

GCC License Corporation (GCC), a mobile cellular carrier in South Dakota, petitioned the Public Utilities Commission of South Dakota (South Dakota PUC) for federal eligible telecommunications carrier ("ETC") status in order to be eligible for federal universal service support, as required by federal law. The South Dakota PUC declined to approve federal ETC status for GCC, in part because GCC was neither providing nor advertising a universal service offering at this time, thus not allowing the South Dakota PUC to determine whether GCC would meet the federal ETC requirements. (South Dakota PUC, Findings of Fact and Conclusions of Law; Notice of Entry of Order, Docket TC98-146, May 19, 1999.)

Western Wireless Corporation ("WW"), the parent of GCC, petitioned the FCC to preempt the South Dakota PUC ruling because it constitutes a barrier to WW's providing

Minnesota Department of Public Service
September 2, 1999 Comments in CC Docket No. 96-45

a universal service offering in South Dakota (Petition for Preemption of an Order of the South Dakota Public Utilities Commission, June 23, 1999). WW argues that a state commission must designate a carrier as a federal ETC if that carrier has the capability and commitment to provide universal service once it is designated (WW Petition, p. 9).

Recommendation of the Minnesota Department of Public Service

The MNDPS, a state agency charged with investigation, advocacy and enforcement functions, represents the public interest before the Minnesota Public Utilities Commission ("Minnesota PUC"). In this capacity, the MNDPS has recently provided analysis and recommendations to the Commission in response to a petition by Minnesota Cellular Corporation ("MCC"), a wholly owned subsidiary of WW, for federal ETC status in Minnesota. Many of the issues addressed by the Western Wireless petition to the FCC were addressed in the three briefs filed with the Minnesota PUC by the MNDPS in the MCC case. The July 19, 1999 Initial Brief of the MNDPS ("Initial Brief"), the Reply Brief of the MNDPS ("Reply") filed July 30, 1999, and the August 17, 1999 Supplemental Brief of the MNDPS ("Supplemental Brief") are attached. The MNDPS recommends that its approach be considered by the FCC in reviewing the decision of the South Dakota Public Utilities Commission ("South Dakota PUC").

The MNDPS contends that a determination of *eligibility* for ETC funding requires only a finding that an applicant is capable of providing the nine (9) supported services listed under 47 C.F.R. section 54.101 (Initial Brief, pp. 16-19). Going forward, the ETC's actual receipt of universal service funding is conditional on meeting other general universal service requirements. Moreover, the ETC is subject to continuing state oversight to ensure that it remains in compliance with both federal and state regulatory provisions governing ETCs (Id, pp. 21-2). This phased approach allows a state commission to carry out its mandate to verify that carriers not receive federal universal service support unless they meet federal and state ETC requirements, while, at the same time, facilitating competitive entry. "[T]here is sequential progression – ETC designation, then provision of supported services, then receipt of funding." (Initial Brief, p. 18.)

The MNDPS believes its approach is consistent with the decision of the Fifth Circuit Court of Appeals in Texas Office of Public Utility Counsel v. FCC, No. 97-60421, ____ F.3d, 1999 WL 55461 (5th Cir. 1999). (Supplemental Brief, pp. 3-8.)

Sincerely,

Edward Fagerlund
Telecommunications Unit
Minnesota Department of Public Service

Minnesota Department of Public Service
September 2, 1999 Comments in CC Docket No. 96-45

EF/jl
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Western Wireless

Press Release

Western Wireless becomes first carrier in nation to be designated as an Eligible Telecommunications Carrier for universal service funding in rural areas

Bellevue, WA September 30, 1999:

In a landmark ruling yesterday, The Minnesota Public Utilities Commission ("MPUC") designated Western Wireless Corporation (NASDAQ:WWCA) as an Eligible Telecommunications Carrier ("ETC"). The ruling makes Western Wireless the first competitive telecommunications carrier in the nation to be designated as an Eligible Telecommunications Carrier ("ETC") for purposes of universal service support in areas served by rural telephone companies.

The decision by MPUC took a significant step toward bringing the benefits of competition to rural consumers by giving Western Wireless ETC status in its cellular service area in Minnesota. Significantly, the MPUC concluded that designating Western Wireless as an ETC is in the public interest and that all consumers should have access to Western Wireless' universal service offering. As an ETC, Western Wireless is now eligible for universal service funding which will allow the Company to effectively compete with the local exchange carriers in the residential and business telephone service market. "This decision goes a long way in leveling the playing field for us to effectively compete with the local phone companies. Even better, it also brings a healthy competition to the marketplace, which only benefits the consumer", said John Stanton, Chief Executive Officer for Western Wireless.

Western Wireless has applications pending in a number of other states seeking ETC designation, which is part of the Company's efforts to expand its conventional cellular service offerings to include universal service offerings in rural America. One of those markets is Regent, North Dakota, where Western Wireless already provides universal service offerings to the residents there. The Company recently won a judgment against Consolidated Telephone, the local telco in Regent, who blocked Western Wireless' efforts in offering service to the customers there. The Regent ruling for Western Wireless was also a first for wireless carriers as rural telcos begin to feel the competition in small town America.

Western Wireless Corporation (NASDAQ:WWCA) is a leading provider of rural communications in the Western United States and operates wireless cellular phone systems marketed under the Cellular One® national brand name in 18 states west of the Mississippi River. Through the second quarter of 1999, Western Wireless was providing service to nearly 740,000 customers. In addition, Western Wireless International holds licenses to offer wireless services in 7 countries. You can learn more about Western Wireless at www.wwireless.com

End

• For Release 5p.m. EDT, September 30, 1999

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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| In the Matter of |) | |
| |) | |
| Federal State Joint Board on |) | CC Docket No. 96.45 |
| Universal Service |) | |
| |) | DA 99-1535 |

**REPLY COMMENTS
of the
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION
September 17, 1999**

**Washington Utilities and Transportation
Commission
1300 South Evergreen Park Drive SW
Olympia, WA 98504
(360) 664-1293**

Introduction

The Washington Utilities and Transportation Commission (WUTC) offers these reply comments to refocus the debate on the first principles set out in the Telecommunications Act of 1996 (1996 Act): preserving and advancing universal service, facilitating competition, reducing regulation and prices, increasing service quality and encouraging rapid deployment of new technologies. These principles should guide the Commission and states as they consider the complexities inherent in making substantial and far-reaching regulatory and de-regulatory changes, whether those complexities result from ever-changing technological capabilities or from legislation that “is in many respects a model of ambiguity or indeed even self-contradiction.”¹

The WUTC has generally encouraged competition in the telecommunications markets subject to its jurisdiction. At the same time, the WUTC gives equal weight to the critical goal of preserving and advancing universal service in Washington. This proceeding is an opportunity for the FCC to provide broad policy guidance on issues identified by our comments. This guidance, however, must respect state authority provided for under the 1996 Act. There is substantial diversity of economic and market characteristics across the nation’s more than 1,000 rural telephone companies. Congress was clear that *states* should determine the public interest in permitting multiple eligible telecommunications carrier (ETC) designations under Section 214(e) and interconnection under Section 251(f). In making those determinations, the commissions in each individual state are in the best position to understand the circumstances facing rural telephone companies and consumers.

Specific Comments:

The WUTC offers comments on the following issues raised by the Petition:

¹ *AT&T Corp. v. Iowa Utilities Bd.*, 119 S. Ct. 721, 738 (1999).

1. State designation of ETCs prior to the provision of service;
2. State-imposed criteria on eligibility;
3. Support for local usage; and
4. Universal service and investment in rural infrastructure.

The policy issues and recommendations presented in these comments are consistent with our belief that properly implemented, competitive reforms can be beneficial to both the industry and consumers. However, the ultimate decision regarding whether allowing more than one carrier to be designated as an ETC in an area served by a rural telephone company is in the public interest remains at the discretion of state commissions.

1. State Designation of ETCs Prior to the Provision of Service

Competitive entry requires that states be able, if not required, to designate ETCs prior to the provision of service in the geographic area (service area) where the new entrant plans to compete using support to defray the cost of providing service. In many rural areas the cost of providing service is often \$50.00 to \$100.00 dollars per month and may go as high as \$400.00 to \$500.00 per line.² Competitive entry simply will not occur if a carrier must invest in plant and equipment in such an area prior to knowing if it will be designated an ETC. A company that made such an investment and did not receive ETC status would have to offer local service at rates five to fifty times greater than the incumbent ETC and any other ETCs. Only if ETC status can be secured prior to investment will it be prudent to invest in high-cost locations.

ETC designation prior to provision of service does not mean that a carrier will receive

² In Washington, the highest estimated cost for providing service as determined on a forward looking basis through the use of a proxy model for an exchange operated by other than an independent carrier is \$476.21. *See* WUTC Docket No. UT-980311, Tenth Supplemental Order, November 20, 1998.

support without providing service or without the obligation to provide service to any applicant within the geographic service area for which it is designated. Support should only flow to the ETC when lines are put in service. Once lines are put in service through use of its own facilities, acquired unbundled network elements, or resale, the ETC should be required to respond to any request for service from any portion of the service area using any combination of the three types of these service options. If the carrier is unable to meet requests, or if it appears to honor requests in the low-cost portion of the service area and shun them in the high-cost portion, then the ETC should be subject to sanctions, including possible loss of its ETC status.

ETC designation prior to the provision of service is consistent with the Act. Section 214(e)(1)(A)³ requires that an ETC “offer the services that are supported by federal universal service support mechanisms...” One can offer what one does not have immediately available. This is the case in many areas of commerce. The buying and selling of commodities is one example, but a more apt one is construction. When a company or family wants a new building or house, contractors do not usually have them already constructed, rather they agree to build what the customer wants. The same is true for the provision of new telephone service where customers contact a carrier, put in an order, and expect it to be filled in a reasonable time.

A better analogy for ETC designation is the registration of telecommunications companies. All states have some form of registration or certification program for companies entering the state for the first time. The carrier applies for authority to do business in the state and makes certain representations that it will abide by the state laws and rules that govern telecommunications. The registration or certificate is then granted or denied. Only after the application is granted can the carrier begin to serve customers; states would not tolerate carriers

³ 47 U.S.C. § 214(e)(1)(A).

entering first and then requesting permission to operate. States should treat ETCs in a similar fashion by having them seek the designation first, make appropriate representations, and confirm adherence to those representations when support payments are requested. Only if the representations are not met should the carrier be subject to state action that might prevent receipt of support. A carrier that has ETC designation can make investment and proceed at its own pace prior to actually providing service to the first supported customer, at which time it would have the obligation to meet all applications for service in the geographic area for which it has been designated. We offer this as a reasonable approach that will encourage entrance to high-cost markets and the consequent deployment of new technologies.

2. State-Imposed Criteria on Eligibility

The WUTC believes that, properly implemented, the opening of local markets to competitors will have beneficial effects for both consumers and the industry. Along with policy and regulatory reforms necessary to open local markets comes a corresponding obligation to implement additional reforms necessary to preserve and advance universal service. For example, the FCC recently approved a joint proposal by the WUTC and every rural telephone company in Washington for disaggregating embedded federal universal service support for rural telephone companies down to the sub-wire center level.⁴ Disaggregating support in this manner facilitates easier entry by competitors. It also discourages uneconomic “cherry picking” of the best customers, which ultimately could undermine universal service.

State-imposed criteria on eligibility should not act to keep a carrier from crossing the threshold of designation, but rather provide standards to be met by any carrier acting as an ETC and requesting and receiving support. Like the analogy above to registration, states should test

⁴See FCC Memorandum, Opinion and Order, DA 99-1844, CC Docket No. 96-45, (September 9, 1999).

the adherence to the criteria not in the abstract, but only after service is provided and support requested.

Washington has imposed service quality criteria on ETCs designated in 1997.⁵ The markets in Washington where competitively and technologically neutral support may one day be offered are not yet so robust that market forces alone can ensure high-quality service. Other states may want to have similar criteria and should be permitted to impose them if they do not retard or act as a barrier to competitive entry.

Criteria imposed by states should be technologically neutral as well as competitively neutral. States should not, for example, impose standards from one technology on another one. Call-completion by wireline carriers, for example, should not be compared to call-completion of cellular carriers, with cellular carriers found wanting. Rather, customers should be able to choose one or both technologies, using their differences to aid in the choice. A customer who needs reliability, such as an individual with severe health problems, will make the choice of the carrier with the best call-completion record. The customer who sells real estate and wants mobility bundled with basic service may eschew the call-completion capability of wireline service for less reliable, but mobile cellular service. Differences in the provision of service need not necessarily be cast as a quality issue so much as an opportunity for product differentiation in a competitive market.

The Fifth Circuit Court of Appeals recently found that states are not prohibited by the 1996 Act from imposing their own eligibility requirements on carriers.⁶ Because one carrier's

⁵ See Order Designating Eligible Telecommunications Carriers, Docket Nos. UT-970333-54 and UT-970356, Washington Utilities and Transportation Commission (December 23, 1997).

⁶*Texas Office of Public Utility Counsel v. FCC*, 183 F.2d 393, 417 (1999).

quality of service issue may be another carrier's barrier to entry, the FCC should permit states to impose criteria on eligibility but should provide guidelines which states may follow so as to not impede entry into markets.

3. Support for Local Usage

Determination of the amount of support for local usage should be left to the states, but should be applied in a way that does not create barriers to entry. Many states require wireline carriers to offer monthly, flat-rate service. It does not follow that flat-rated usage is the only level of service for which universal service support is appropriate under the FCC rules. Cable television, which is capable of providing telephony, has long been sold on a monthly, flat-rate basis, but cellular and satellite telephony have almost exclusively been sold on a per-minute basis. Washington does not interpret the requirement for support for local usage as a requirement for one-size-fits-all regulation. Universal service support should not limit customer choice but rather should encourage product differentiation. If the FCC expands upon its direction in this area, it should be to require states to make full and complete records when determining the level of support for local usage, so that any challenge to the reasonableness of a decision can be dealt with expeditiously.

4. Universal Service and Investment in Rural Infrastructure

With the passage of the 1996 Act, Congress made a fundamental shift in our nation's telecommunications policy, and a fundamental promise. The shift was a removal of legal restrictions to local competition. The promise was that universal service would not be harmed by competition. With respect to areas served by rural telephone companies, Congress gave state commissions specific authority, including the responsibility to determine if petitions for designation as an ETC or for interconnection are in the public interest.

The fundamental purpose of the 1996 Act was to promote investment by both incumbents and competitors in our nation's telecommunications infrastructure. We believe investment in

rural telecommunications infrastructure requires both sufficient universal service support and the opening of local markets where state commissions find that it is in the public interest. State commissions are, as Congress saw, closest to the issues at hand in this case.

Conclusion

The FCC has the opportunity now to provide guidance on what should be required of states to make full and complete records when determining whether to allow more than one ETC in an area served by a rural telephone company. The WUTC would view such guidance as helpful and consistent with our desire to implement policies which ensure that both incumbents and competitors will invest in telecommunications infrastructure serving our rural communities. DATED at Olympia, Washington, and effective this 17th day of September, 1999.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

WILLIAM R. GILLIS, Commissioner

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